

Decision **DRAFT DECISION OF ALJ BUSHEY** (Mailed 1/17/2006)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

UTILITY CONSUMERS' ACTION NETWORK,

Complainant,

v.

CINGULAR WIRELESS,

Defendant.

Case 05-07-022  
(Filed July 22, 2005)

**INTERIM OPINION GRANTING MOTION TO DISMISS  
IN PART AND DENYING IN PART**

**I. Summary**

Complainant alleges that defendant has placed unauthorized charges on its customers' bills, a practice known as "cramming." This Commission has a long history of protecting California consumers through enforcement of statutory prohibitions against unauthorized charges on their telephone bills. Consistent with our duty under the statutes, we deny the motion to dismiss of New Cingular Wireless PCS, LLC (Cingular).<sup>1</sup> We are taking the unusual procedural step of issuing an interim decision to deny this motion due to the importance of

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<sup>1</sup> Cingular explained that this is the current name of its primary regulated entity in California.

preventing cramming. We reiterate that all billing telephone companies must comply with §§ 2889.9 and 2890<sup>2</sup> to ensure that only authorized charges are placed on subscribers' bills.

## **II. Background**

On July 22, 2005, Utility Consumers' Action Network (UCAN) filed this complaint alleging that Cingular was failing to comply with applicable law and Commission regulations applying to the provision and billing of services through Cingular's network. UCAN stated that Cingular placed charges for services such as ring tones, joke-a-day programs, and video wallpaper on its customers' bills in violation of applicable law and regulations.

UCAN noted that the California Legislature and this Commission differentiate between charges for "communications-related" and "non-communications-related" services and products in setting billing requirements, with more exacting rules applied to billings for non-communications-related services and products. Consequently, the key first step is to determine whether the billed service or product is communications-related or not.

UCAN, covering both alternatives, contended that Cingular had violated the requirements however its services were construed. UCAN argued at length that the charges were for non-communication services, and thus subject to the Commission's rules for such services adopted in Decision (D.) 01-07-030 (Interim Rules). UCAN also maintained that, should the Commission disagree and find that the charges were communications-related, Cingular had also violated California law for billing communications services.

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<sup>2</sup> All statutory references are to the Public Utilities Code unless otherwise indicated.

**III. Cingular's Motion to Dismiss**

On September 23, 2005, Cingular moved to dismiss the complaint. According to Cingular, UCAN failed to state a claim that Cingular had violated the Interim Rules because the services in question were communications-related, such that the Interim Rules did not apply. Cingular also contended that even if the charges were for non-communications services, the Commission was preempted by federal telecommunications law from exercising any authority over the charges. Cingular also stated that the Federal Arbitration Act, 9 U.S.C. §§ 1-6, further precluded the Commission from resolving the complaint. Cingular also argued that UCAN had "vaguely and summarily" raised violations of the § 2890, but Cingular did not otherwise respond to these allegations. Cingular instead stated that it reserved the right to respond "if UCAN provides additional facts." Finally, Cingular challenged the Commission's authority to order reparations and award punitive damages.

In response, UCAN argued that the question of whether or not the charges were for communications-related services was factual and must therefore be decided based on the evidentiary record after hearings. UCAN disputed Cingular's contention that federal telecommunications law preempted state consumer protection laws. After a discussion of federal telecommunications preemption law, UCAN pointed to the Commission's 2002 decision in Investigation (I.) 02-06-003 denying Cingular's similar arguments that federal law preempted state consumer protection laws, and concluding that federal law allows the states to adjudicate consumer protection matters that do not regulate wireless rates or terms of entry. In the ultimate decision in I.02-06-003, the Commission found that Cingular had violated §§ 451, 702, and 2896, and D.95-04-028. The Commission assessed a fine of over \$12 million on Cingular,

which was paid in full. UCAN concluded that its analysis of federal law and the Commission's earlier Cingular decisions substantially undermined Cingular's similar arguments in its motion to dismiss in this proceeding. UCAN also noted that Cingular "ignored" UCAN's alternative argument that if the charges were communications-related, then Cingular had violated § 2890, the California "anti-cramming" law.<sup>3</sup> Regarding Cingular's arbitration argument, UCAN cited to a recent California Court of Appeal decision holding that Cingular's arbitration clause was unconscionable, *Parrish v. Cingular Wireless LLC*, 205 Cal. App. Unpub LEXIS 9021 (Oct.3, 2005).

With the permission of the assigned ALJ, Cingular replied to UCAN's § 2890 arguments and contended that UCAN had failed to state a cause of action for violating this statute. Cingular stated that § 2890 allows it "a substantial amount of flexibility to design convenient and effective authorization methods that meet the needs of the customer-business relationship." Cingular concluded that its methods requiring customers to take "at least one affirmative step" to order services was sufficient to meet the authorization requirement in § 2890.

#### **IV. Discussion**

Rule 56 of the Commission's Rules of Practice and Procedure provides a party the right to file a motion to dismiss any proceeding before the Commission. To grant a Rule 56 motion to dismiss the Commission must determine that there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. *Westcom Long Distance, Inc. v. Pacific Bell*, 54 CPUC 2d 244, 249

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<sup>3</sup> "Cramming" is the popular term for placing unauthorized charges on a telephone bill. The often associated term "slamming" refers to transferring telephone service, usually long-distance, without authorization.

(D.94-04-082). Cingular has demonstrated that it meets these standards for the portions of the complaint related to non-communications related charges but not for communications-related charges.

We begin with Cingular's argument that federal telecommunication law preempts states from regulating the provision and billing for wireless content services. State regulation, according to Cingular, would lead to a patchwork of inconsistent rules that would contravene established federal policy. We have previously rejected a similar preemption argument from Cingular in the two decisions cited above from I.02-06-003. Consistent with the precedent, we again reject Cingular's argument that it is not subject to California consumer protection laws.

After detailed analysis of federal law, the Commission concluded in that decision that federal law permits the states to adjudicate consumer protection matters that do not seek to regulate wireless rates or terms of entry:

We find Cingular's federal preemption arguments unpersuasive. The Order Instituting Investigation (OII) raises the kind of consumer protection matters that federal law permits the states to adjudicate. The OII neither expressly nor impliedly seeks to regulate wireless rates or terms of entry. Cingular fails to establish otherwise, and we deny the motion to dismiss.<sup>4</sup>

In a subsequent decision in that docket, the Commission used this authority to determine that Cingular had violated, among other things, §§ 451 and 2896, and

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<sup>4</sup> Investigation on the Commission's Own Motion into the operations, practices, and conduct of Pacific Bell Wireless LLC dba Cingular Wireless, U-3060, U-4135, and U-4314, and related entities, (collectively, "Cingular") to determine whether Cingular has violated the laws, rules and regulations of this State in its sale of cellular telephone equipment and service and its collection of an Early Termination Fee and other penalties from consumers, D.02-10-061, *mimeo.* at p.13.

the Commission ordered Cingular to make reparations to customers and pay a fine of \$12,140,000.

In its complaint, UCAN alleges that Cingular has violated the Interim Rules and/or § 2890, both of which are consumer protection laws, and neither of which regulate rates or terms of entry. Accordingly, we determine that federal law has not preempted our adjudication of UCAN's complaint. Cingular has failed to show that it is entitled to judgment in its favor as a matter of law on the basis of preemption.

Cingular's next argument is that the charges at issue are communications-related and thus not subject to the Interim Rules, which only apply to non-communications charges. As UCAN pointed out, Cingular has ignored UCAN's alternative contention that if the charges are communications-related, then Cingular has violated § 2890. Accordingly, even if Cingular were to prevail in its motion to dismiss on the narrow issue of whether the charges were communications-related, UCAN's alternative contention would remain and preclude granting the motion to dismiss in full. Consequently, we could deny the motion to dismiss on this basis alone and not reach the question of whether the charges are communications-related or not. However, to provide guidance to the parties and the Assigned Commissioner and Administrative Law Judge (ALJ), we will address this issue.

As required by § 2890.1, the Commission adopted in D.01-07-030 the additional rules it determined to be necessary to implement the billing safeguards of § 2890 for non-communications-related charges. These rules, the Interim Rules, require that the billing telephone company obtain written authorization from the subscriber authorizing the inclusion of noncommunications-related charges on the telephone bill prior to any such

charge being placed on the bill. After implementing this general “opt in” authorization, the subscriber is then issued a personal identification number, or equally reliable security procedure, which must be used with each transaction. Drawing on §§ 2890, 2896, and Business and Professions Code § 17500, the Interim Rules require that billing telephone companies bill only for charges authorized by the subscriber, and take reasonable precautions to screen prospective billing agents and vendors.

The Interim Rules apply only to billings for non-communications-related charges, which are defined in the negative as “any charge that is not communications-related.” The definition of “communications-related” charges is derived from § 2890:

Services tariffed by telephone utilities; services permitting voice and data communications, including charges for installation of equipment and facilities; telecommunications equipment that is connected to a telecommunications network; wireless communications service; internet access; video service; message service; information service, including pay-per-call service; and cable set top boxes.

Interim Rules, D.01-07-030, App. A, p. 4.

In its motion to dismiss, Cingular contends that wireless content services<sup>5</sup> are “information services,” “message services,” and/or “data communications.” Cingular argues that because the Commission has not defined these terms, the

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<sup>5</sup> “Wireless content services” does not derive from § 2890 or Commission regulations but rather is a term that Cingular has coined to encompass the services included in the complaint, i.e., ring tones, joke a day programs, wallpaper, screensavers, and other forms of software.

definitions adopted by the Federal Communications Commission (FCC) should control.

The plain words of our definition of “communications-related” charges provide sufficient guidance to determine whether the services included in the complaint fall within the definition of “communications-related.”<sup>6</sup> Services used by the wireless telephone, e.g., ring tones, wallpaper, or information delivered to the wireless telephone, e.g., joke-a-day service, are related to the wireless communication and thus included in the definition. Accordingly, we conclude that the services included in the complaint fall within the definition of communications-related, and we grant Cingular’s motion to dismiss the portions of the complaint based on the Interim Rules. Although the Interim Rules do not apply *per se* to the billings for these types of services, as discussed further below, Cingular’s billings of communications-related services are subject to California’s anti-cramming statutes, which are the genesis of many of the Interim Rules.

## **V. Billing for Communications-Related Services**

The legal basis for the subscriber authorization requirements for all telecommunication billings is found in §§ 2889.9 and 2890. The California Legislature adopted these laws in response to widespread billing of unauthorized charges on local exchange carriers’ bills in the late-1990’s.<sup>7</sup> These

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<sup>6</sup> Consequently, there is no need at this time to take official notice of the voluminous FCC reports and orders defining the FCC’s use of similar terms, and we deny Cingular’s motion to do so.

<sup>7</sup> See, e.g., Senate Bill 378 Analysis, August 26, 1998, (finding that “cramming” is the number one complaint by telephone subscribers to the PUC now that the less restrictive regulatory environment allows telephone corporations to sell billing services to third parties; many unauthorized charges are initiated by raffles, sweepstakes, and

*Footnote continued on next page*



massive consumer deceptions occurred when local exchange carriers were required to bill for third-party providers of telecommunications services. Unscrupulous providers, and billing intermediaries, called “billing agents” in § 2890(f), soon discovered that customers usually paid their local telephone bill without question, often due to fear of service disconnection, regardless of whether the billed charges were authorized. Subsequently, the Commission, Legislature, and local telephone carriers, adopted laws and regulations to prevent further customer abuses.

A short review of two Commission cases illustrates the important role of these statutes in protecting consumers. The Commission investigated a third-party billing agent that had placed charges on local telephone bills without authorization. In *Investigation of USP&C*, D.01-04-036, the Commission found that from January 1998 to June 1999, USP&C, Inc. (USP&C) served as the billing agent for \$51.5 million of billings to California customers. USP&C presented billings for service providers that operated under several different unregistered aliases, and that also used up to four different names for identical services. Of the total amount billed by USP&C during this period, \$27 million (52%) was refunded at the customer’s request. The remaining \$24.5 million, however, was collected by USPC, and was forwarded to the service providers, net of the fees charged by USP&C. The Commission imposed a fine of \$1,750,000 on USP&C,

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telemarketers of unknown and unscrupulous companies using “fine print authorizations for billing charges,” and that SB 378 “requires that products or services placed on a telephone bill contain subscriber authorization.”) (This analysis, and others, of SB 378 is available on the California Legislative Information Service website, <http://leginfo.ca.gov/>.)

ordered reparations, and required all local exchange carriers to cease permanently providing USP&C billing and collection services. The United States Attorney's Office for the Eastern District of New York subsequently indicted USP&C, along with members of the Gambino crime family, for additional cramming violations, seeking \$430 million in criminal forfeiture.<sup>8</sup>

The Commission also saw inadequate or "fine print" authorizations for charges. In *Coral Communications*, D.01-04-035, the Commission found that Coral Communications, Inc. (Coral) had placed nearly \$6 million of unauthorized charges on the local telephone bills of over 250,000 Californians. Coral based these charges on sweepstakes entry forms, often completed by children, that contained purported authorizations in the fine print. To get the billings on the local telephone bills, Coral used multiple levels of billing agents between itself and the local exchange carrier (LEC) that actually billed the customer. Coral also converted the billings to cash by selling its accounts receivable to financing firms called "factors." The LECs, billing agents, and factors all retained portions of the improperly-billed amounts for their fees and charges, as well as reserves for customer refunds. The Commission ordered full refunds of all charges assessed by Coral, but Coral was defunct and insolvent so no reparations were ever paid.

This history illuminates the purpose of § 2890 – to ensure that all charges on a telephone bill are authorized by the subscriber, the person responsible for paying the bill. Subsection (a) states: "[A] telephone bill may only contain charges for products or services, the purchase of which the subscriber has authorized." Similarly, subsection (d) imposes obligations on telephone

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<sup>8</sup> <http://www.usdoj.gov/usao/nye/pr/2004feb10.htm>.

companies providing billing services to third-party service providers, as well as the service providers. Dispute resolution requirements are also set out in § 2890(e).

Protecting California consumers requires that we enforce these statutory prohibitions against unauthorized charges. Although not procedurally necessary, we are using an interim decision to address Cingular's motion to dismiss due to the importance of this consumer protection directive. We also emphasize that all billing telephone companies must comply with §§ 2889.9 and 2890 to ensure that only authorized charges are placed on subscribers' bills.

Questions of fact and law for resolution in this complaint surround the issue of whether Cingular's ordering methods meet the subscriber authorization requirement of § 2890(a), and the dispute resolution requirements of § 2890(e). The Assigned Commissioner and ALJ should develop a record necessary to resolve these issues and bring forward a decision for our consideration.

## **VI. Comments on Draft Decision**

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Public Utilities Code and Rule 77.7 of the Rules of Practice and Procedure. Cingular filed comments that agreed with the draft decision's conclusion that the services at issue in the complaint are communications-related, and the portion of the complaint alleging violations of the rules applicable to non-communications related charges should be dismissed.

Cingular contended that the portions of the complaint related to communications-related charges should also be dismissed because "affirmative actions" were taken to order the services. Cingular also contended that UCAN's complaint was procedurally defective in that it failed to comply with § 1701 and state a claim specifying how Cingular violated the cited statutes.

UCAN filed reply comments and stated that the complaint met the standard in § 1701 by alleging “with specificity that Cingular did wrong ... and how Cingular’s conduct violated numerous provisions of the Public Utilities Code.” UCAN included extensive quotations from its complaint to support this assertion.

The legal standard set in § 2890(a) requires all charges to be authorized by the subscriber. Cingular has not shown, as a matter of law, that its affirmative actions meet the requirements of § 2890(a). Similarly, Cingular has ascertained the violations which UCAN alleges, thus the complaint meets the requirements of § 1701. Accordingly, we will not dismiss this portion of the complaint.

## **VII. Assignment of Proceeding**

Dian M. Grueneich is the Assigned Commissioner and Maribeth A. Bushey is the assigned ALJ in this proceeding.

## **Finding of Fact**

Disputed issues of material fact and law exist with regard to the complaint.

## **Conclusions of Law**

1. Charges for services used by a wireless telephone or for information delivered to a wireless telephone are communications-related.
2. Federal telecommunications law raised by Cingular in its motion to dismiss does not preempt California telecommunications consumer protection law.
3. The Interim Rules adopted in D.01-07-030 apply only to non-communications-related charges.
4. Cingular’s motion to dismiss should be granted to the extent the complaint alleges that communications-related charges violated the Interim Rules.

5. The motion to dismiss should be denied with regard to violations of law and regulations applicable to communications-related charges.
6. Cingular's motion to dismiss should be granted in part and denied in part.
7. This decision should be effective immediately.

**INTERIM ORDER**

**IT IS ORDERED** that the motion to dismiss by New Cingular Wireless PCS, LLC is granted in part and denied in part, as set forth above.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.